IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1945

No. .....

THE STATE OF NORTH DAKOTA,
Petitioner.

vs.

RAPHAEL JEROME SZARKOWSKI,
Respondent.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Bankrupt deposited in court the original appraised value of the encumbered property for the purpose of effecting a redemption thereof. The State of North Dakota, a secured creditor holding sheriff's certificate of mortgage foreclosure sale issued upon foreclosure of a mortgage held by the State, requested a reappraisal of the property as provided by the first proviso of Section 75 (s) (3) of the Bankruptcy Act now in force. A reappraisal, or rather a revaluation by the court after hearing on value, was had. This revaluation was not, in the estimation of the State, a fair revaluation of the property. This valuation was, however, sustained by the Circuit Court of Appeals.

Thereupon, the State, as such secured creditor, made a written request for a public sale of the property involved as provided by the second proviso of Section 75 (s) (3) of said Act. Upon hearing, the Conciliation Commissioner made his

order denying such request. On review, this order was affirmed by the District Court by order of date, February 2, 1945. The order of the District Court was affirmed by the order of the Circuit Court wholly on the ground that the question was determined by the decision of the Supreme Court in the case of *Wright vs. Union Central Life Insurance Co.*, 311 U. S. 273, 61 S. Ct. 196, 85 L. ed. 184. This is the order which petitioner seeks to review.

STATEMENT OF POINTS RELIED UPON

Congress amended the original Frazier-Lemke Act by inserting in Section 75 (s) (3) the following:

> "Provided, that upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which such property was sold, together with 5 percentum per annum interest, into court, and he may apply for his discharge as provided for by this act."

This creditor is entitled to the benefit of this amendment, without which the act was held unconstitutional.

POSITION OF SECURED CREDITOR

It is the position of the State as such secured creditor that the granting of such request is mandatory upon the court under the terms of said act; and that the denial thereof is a direct violation of the Fifth Amendment to the Constitution of the United States, and a misconstruction of the amendment above quoted.

POINTS TO BE ARGUED

The order of the Circuit Court which we seek to review denies the creditor the benefit of the amendment above quoted, and thereby denies it the benefit of the Fifth Amendment to the Constitution, which guarantees that its property shall not be taken without due process of law, and misconstrues the amended Frazier-Lemke Act.

Frazier-Lemke Act, approved June 28, 1945.

Louisville Joint Stock Land Bank vs. Radford, 295 U. S. 555, 79 L. ed. 1592, 55 S. Ct. 854, 97 A. L. R. 1106.

Wright vs. Vinton Branch of Mountain Trust Bank, 300 U. S. 440, 81 L. ed. 736, 57 S. Ct. 556, 112 A. L. R. 1455.

8 *C. J. S., Bankruptcy,* Sec. 326, p. 1079.

Federal Land Bank vs. Nalder, 116 F. (2d) 1004.

Wright vs. Union Central Life Insurance Co., 311 U. S. 273, 85 L. ed. 184, 61 S. Ct. 196.

Wright vs. Union Central Life Insurance Co. (C. C. A., 7 Cir.), 126 F. (2d) 92.

In re Lowman (7 Cir.), 107 F. (2d) 540, 544.

In re Moon (7 Cir.), 107 F. (2d) 545.

In re Monjon (7 Cir.), 113 F. (2d) 535.

In re Diller (D. C., S. D., Calif.), 13 Fed. Supp. 249.

In re Schoenleber (D. C., Neb.), 13 Fed. Supp. 375.

In re Carter, 56 Fed. Supp. 385.

Ochoa vs. Hernandez Y. Morales, 230 U. S. 139-161, 57 L. ed. 1427, 1437.

Helvering vs. Hallock, 309 U. S. 106-122, 84 L. ed. 604-614.

ARGUMENT

The present act is the original Frazier-Lemke Act, approved June 28, 1934, as amended by the act approved August 28, 1935. The material part of the act of June 28, 1934, reads as follows:

> "At the end of five years, or prior thereto, the debtor may pay into court the appraised price of the property of which he retains possession; provided, that upon request of any lienholder on real estate the court shall cause a reappraisal of such real estate and the debtor may then pay the reappraised price, if acceptable to the lienholder, into the court, otherwise the original appraisal price shall be paid into court and thereupon the court shall, by an order, turn over full possession and title of said property to the debtor and he may apply for his discharge as provided for by this act; provided, however, that the provisions of this act shall apply only to debts existing at the time this act becomes effective."

This act was held unconstitutional by the Supreme Court in the case of *Louisville Joint Stock Land Bank vs. Radford,* 295 U. S. 555, 79 L. ed. 1592, 55 S. Ct. 854, 97 A. L. R. 1106, in an opinion written by Justice Brandeis. Referring to this case, Justice Brandeis, in a case construing the amended act, approved August 28, 1935, said:

> "The original Frazier-Lemke Act was there held invalid solely on the ground that the bankruptcy power of Congress, like its other great powers, is subject to the Fifth Amendment; and that as applied to mortgages given before its enactment, the statute violated that amendment, since it effected a substantial impairment of the mortgagee's security."

Justice Brandeis enumerates five particulars in which the act deprives the mortgagee of valuable rights without due process. These are as follows:

1. The right to retain the lien until the indebtedness thereby secured is paid.

2. The right to realize upon the security by a judicial public sale.

3. The right to determine when such sale shall be held, subject only to the discretion of the court.

4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale, or by taking the property itself.

5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt. Justice Brandeis further said in closing his opinion:

> "The province of the court is limited to deciding whether the Frazier-Lemke Act, as applied, has taken from the Bank, without compensation, and given to Radford, rights in specific property which are of substantial value. * * * As we conclude that the act as applied has done so, we must hold it void. For the Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that through taxation, the burden of the relief afforded in the public interest may be borne by the public."

Congress undertook to obviate this defect in the law by amendment, and the constitutionality of the amended act was before the court in the case of *Wright vs. Vinton Branch*

of Mountain Trust Bank, 300 U. S. 440, 81 L. ed. 736, 57 S. Ct. 556, 112 A. L. R. 1455. In the Wright case, Judge Brandeis said:

> "In drafting the new Frazier-Lemke Act, its framers sought to preserve to the mortgagee all of these rights (the rights enumerated in the Radford case) so far as essential to the enjoyment of his security. The measure received careful consideration before the committees of the House and the Senate. Amendments were made there with a view to insuring the constitutionality of the legislation recommended. The Congress concluded, after full discussion, that the bill, as enacted, was free from the objectionable features which had been held fatal to the original act."

Justice Brandeis then goes on to say:

> "It is not denied that the new act adequately preserves three of the five above enumerated rights of a mortgagee.
>
> "The right to retain the lien until the full indebtedness thereby secured is paid is specifically covered by the provisions in paragraph 1, that the debtor's possession 'under the supervision and control of the court, shall be' subject to all existing mortgages, liens, pledges, or encumbrances," and that
>
> "All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear;
>
> " 'The right to realize upon the security by a judicial public sale is covered by the provision in paragraph 3 that at the termination of the stay;' * * * upon request in writing by any secured creditor or creditors, the court *shall* order the property upon which such secured creditors have a lien to be sold at public auction."

Justice Brandeis further said:

> "The new act does not in terms provide for 'The right to protect its (the mortgagee's) interest in the property by bidding at such sale whenever held.' * * * But the Committee reports and the explanations given in Congress make it plain that the mortgagee was intended to have this right. *We accept this view of the statute.*" (Italics ours.)

The court elucidated its opinion by notes appearing on pages 458, 459, 460 of the official reports, which we copy here:

> "Amendments to the bill subsequent to its introduction plainly demonstrate careful intention to leave the lien wholly unimpaired. As introduced, the measure provided for retention of the lien 'Up to the actual value of such property, as fixed by the appraisals provided for in this section.' S. 3002, Sec. 6, p. 6 (Compare Act of June 28, 1934, Chap. 869, subsec. (s) (2), 48 St. at L. 1290); and there was no provision for public sale at the request of the secured creditor. As reported out of the Senate Committee on the Judiciary, and as subsequently enacted, the measure provided for *retention of the lien unqualified by reference to the appraisal value of the property.*" (Italics ours.) "See S. 3002, as reported, Sec. 6, p. 6, Sen. Rep. 985, 74th Cong., 1st Sess., p. 3. As reported by the Committee, the bill provided for a public sale *in the discretion of the court, upon request of the secured creditor, and* limited the lienholder's bid at such sales to 'The appraised value or the original principal, whichever is the higher.' S. 3002, *supra,* Sec. 6, p. 9; Sen. Rep. No. 985, *supra,* pp. 4, 6. Since the latter qualification was thought to raise some constitutional doubt, it was eliminated during the Senate's consideration of the measure. See statements of Senators Ashurst and Borah, of the Committee on the Judiciary, and of Senator Frazier, 79th Cong. Rec. 13413, 13633, 13634, 13641. The House Committee on the Judiciary reported the bill with this change. H. R. Rep. No. 1808, 74th Cong., 1st Sess., pp. 1, 4, 6.

"As introduced, S. 3002 contained the provision of the act by which the mortgagor might purchase at the appraised value, subject to the mortgagee's right to require a reappraisal; but it did not provide that the mortgagee might, in lieu of a reappraisal, have a public sale. The bill as reported by the Senate Committee on the Judiciary inserted after the provision for appraisal clause, providing, 'That upon request in writing by any secured creditor or creditors, the court, *in its discretion, if it deems it for the best interests of the secured creditors and debtor,* may order the property upon which such secured creditors have a lien, to be sold at public auction; * * *.' S. 3002, as reported, Sec. 6, p. 9; see Sen. Rep. No. 985, 74th Cong., 1st Sess., p. 4. 'To remove a question as to the constitutionality of the bill, this provision was altered in the course of the bill's passage through the House to deprive the court of discretion in the matter and to *give the secured creditor an unqualified right to a public sale as the alternative to a transfer of the property to the debtor at the reappraised value.* See remarks of Representative Summers, of the House Committee on the Judiciary, 79th Cong. Rec. 14332-33.

"As reported by the Senate Committee on the Judiciary, Sec. 3002, Sec. 6, p. 9, recognized a right in the mortgagee to bid at the sale not in excess 'of the appraised value or the original principal, whichever is the higher.' See Sen. Rep. No. 985, 74th Cong., pp. 4, 6. In striking out this qualification for the express purpose of avoiding a constitutional doubt, senators responsible for the measure plainly showed that they had no intention of raising a further constitutional controversy by questioning the mortgagee's unqualified right to bid. See statements of Senators Ashurst, Borah and Frazier, 79th Cong. Rec. 13413, 13633, 13634, 13641-2, H. R. Rep. No. 1808, 74th Cong., 1st Sess., pp. 1, 5, 6, unequivocally declared that under the act the secured creditors have the right to bid at the sale; and this was made clear on the floor of the House by Representative Summers of the Committee on the Judiciary. See 79th Cong. Rec. 14333."

Having examined the original act and the particulars thereof which condemned it in the judgment of the court in the Radford case; and the amendments thereto by Congress to avoid the objections pointed out by Justice Bandeis, now let us take a look at the amended act as it now stands. The original act, subsection (s), provided that the debtor have possession of his property during the stay period prescribed by the act to be five years in the following terms:

> "That he be allowed to retain possession of any part or parcel or all of the remainder of his property and pay for the same under the terms and conditions set forth in this subsection (s)." (Italics ours.)

The amended act reads as follows:

> "That he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section."

It is significant that the provision that the debtor might "pay for" the property retained by him which is found in the first act is not found in the amended act. It is very apparent that the first act actually intended that the debtor be given the right to retain and pay for any property retained by him at an appraised value and whether such property were encumbered or not. This was an attempt to evade the constitutional provision that private property shall not be taken "without due process of law." And it was this purpose which wrecked the original act.

The original act provided, with respect to liens and encumbrances, that the property of the debtor be retained by him "subject to any existing mortgages or liens upon any such exemptions to an amount equal to the value as fixed by the appraisal, of the value of such exempt property as is covered by any mortgage or lien, and shall further order

that the possession under the control of the court, of any part or parcel or all of the remainder of the debtor's property, shall remain in the debtor subject to a general lien, as security for the payment of the value thereof. * * * Such prior liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such prior liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors holding such prior liens, pledges, or encumbrances *up to the actual value of such property as fixed by the appraisal* provided for herein." (Italics ours.) This is a flagrant violation of the due process clause of the Federal Constitution, and was condemned by the court in the Radford case. This defect in the original act was remedied by the amended act, which provides that the property of the debtor may remain in his possession "subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear." It will be noted that this present law has no such limitation as the first, which provided that the property encumbered should be subjected to the payment of liens "up to the actual value of such property as fixed by the appraisal provided for" in the original act. By the elimination of this limitation the law as amended obviated the constitutional objection that such limitation took away the right of the mortgagee to subject the property to the payment of his debt by a judicial sale of the property, and the further right to bid at such sale without any limitation on the amount of his bid such as was contained in the original act.

Then, further, the first act gave secured creditors no right to have the property sold to pay his debt. The original act

completely denied that right, and this denial caused it to be held violative of the due process clause and hence unconstitutional. As hereinbefore pointed out, the amended act gave the secured creditor a right to such sale upon his mere written request therefor. As further pointed out hereinbefore, the original bill for amending the act which had been found to violate the due process clause of the Constitution, gave such a right conditionally, but to avoid any possible constitutional objection, the amendatory act as finally adopted gave the right in these unequivocal, unconditional words:

> "Provided, that upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction."

This proviso further provides for a right of redemption by the debtor at the amount for which the property was so sold with interest to date of redemption.

This proviso clearly, adequately protects the mortgagee as it subjects the mortgaged property to the satisfaction of his debt at a valuation placed thereon by bidders, at a public sale at which he may himself bid without restrictions on the amount of his bid, instead of at a valuation placed thereon by persons who are merely estimating the value of the property rather than by bidding competitively at an actual sale thereof. To our mind, the greatest scandal incident to the administration of the act has been the reckless manner in which neighbors of bankrupts have gone into court and complacently testified to recklessly low values of such property.

The amended act was held to have obviated all the constitutional objections to the original act, and to be constitutional. That is, the additional protection given by the amended act to the secured creditor by giving him constitutional rights denied him by the original act, cured the fatal defects of the first act.

It seems to us that the foregoing authorities demonstrate that the petitioning creditor herein is now entitled to have the mortgaged property sold at public auction and thereby subjected to payment of his debt. But it is said that to give effect to the statutory right to a public sale is to destroy the manifest intention of the Frazier-Lemke Act. Such intention, it is said, was to give the secured creditor in full satisfaction of his debt such amount as the value of the property might be fixed at, not by a competitive public sale, but by appraisers who had no material interest in the property or debt. In other words, the intent was to deprive the secured creditor of rights guaranteed to him by the due process clause of the Fifth Amendment to the Federal Constitution. This intent was foiled by the Supreme Court in the Radford case.

The subsequent intent, manifested in the amended act, was to give the debtor all possible relief without denying the secured creditor his constitutional rights. It cannot be justly said that the intent of the amended act is to deprive the secured creditor of the rights said by Justice Brandeis to be guaranteed to him by the Fifth Amendment. That is, the intent of the present act is not to violate the Constitution. Such intent is decidedly not contravened by giving the statute a construction whereby the rights granted to the secured creditor are preserved. Indeed, every judicial officer of the nation is bound to protect and defend the Constitution of the United States, and such oath is violated if and when he so construes an act of Congress as to deprive a litigant of a right granted to him by the act construed and guaranteed by the Constitution.

It may be here pointed out that both the original Frazier-Lemke Act of June 28, 1934, and the Amended Act of August 28, 1935, provide for a trustee's sale of the property of the debtor bankrupt, if the debtor fails to comply with the

provisions of the law or the orders of the court. See Section (3) (7) of the Act of June 28, 1934, and Section (s) (3) of the Act of August 28, 1935. Further, in the Amended Act of August 28, 1935, we find that Congress has provided for a sale at the written request of a secured creditor, and for a right of redemption from such sale. There are, therefore, two different sales provided for by the present law:

1. At the request of a secured creditor, the court must order a judicial sale with right of redemption.

2. A trustee's sale, where debtor has failed to comply with the orders of the court. From this sale there is, ordinarily, no right of redemption. See 8 *C. J. S., Bankruptcy*, Sec. 326, p. 1079.

That the last sentence of Section 75 (s) (3), i. e., the provision for a trustee's sale, is no part of the second proviso, was held by the Circuit Court of Appeals of the 10th Circuit in the case of *Federal Land Bank vs. Nalder*, 116 F. (2d) 1004. In that case the court said:

> "It will be observed that after employing the phrase 'this section,' in two instances in the last sentence of Section 75 (s) (3), Congress directed that the sale or disposition be made '*as provided for in this Act.* (title).' Had Congress intended that such sale or disposition should be made in accordance with the provisions of Section 75 (s) (3), rather than the general provisions of the Bankruptcy Act, we think that it would have used the word 'section' instead of 'act.'"

And in the same case, the court said:

> "That portion of Section 75, sub. (s) (1), (2), (3) up to the last sentence of Section 75, sub. (s) (3) looks to the rehabilitation of the debtor, and contemplates the restoration to the debtor of his property freed of liens, through compliance with the provisions thereof. On the other hand, the last sentence of Section 75, sub. (s) (3) provides in the alternative, where efforts of financial

rehabilitation have failed, for a liquidation of the debtor's estate.

"The provision for a sale subject to redemption within 90 days is the alternative to the payment by the debtor into court of the appraised value of his property or the value thereof fixed by the court after a hearing. It is a part of the statutory process for rehabilitation. It is a right accorded the debtor when the secured creditor requests a sale at public auction after the debtor has paid into court the amount of the appraisal, or the reappraisal, or the amount fixed by the court as the value of the property, pursuant to Section 75, sub. (s) (3). We do not think the Congress intended to accord the debtor the right to redemption from the trustee's sale, when he has failed to pay or offer to pay the appraised value or fixed value and has failed to comply with the provisions of the section or with the orders of the court made pursuant thereto. However, violation of the provisions of the sections or orders of the court, made pursuant thereto, does not deprive the bankrupt of the right to have the property appraised, reappraised, or its value fixed by the court and to acquire the property free and clear of encumbrances by paying into court the amount of the appraisal of the property. Before a sale or other disposition should be ordered under the last sentence of Section 75, sub. (s) (3), the court, if so requested, should accord that right to the bankrupt. See Wright vs. Union Central Life Insurance Co., 61 S. Ct. 196, 85 L. ed. 184, decided December 9, 1940."

It seems to have been assumed by many courts that the Supreme Court of the United States, in the case of *Wright vs. Union Central Life Insurance Co.*, 311 U. S. 273, 85 L. ed. 184, 61 S. Ct. 196, deleted from the law the provision giving the secured creditor the right to a judicial sale by the second proviso of Section 75 (s) (3) of the Bankruptcy Act. We have seen that this proviso was put into the act to make it constitutional. No court, then, has a right to deny this right to a secured creditor. It would seem, too, that before a decision of a court ought to be given such effect, the de-

cision should be squarely to the point. An examination of this opinion will at once disclose that the sale there involved was a trustee's sale from which there is no right of redemption, and not a sale under the said second proviso of subsection (s) (3), from which there is a right of redemption. This is clearly pointed out in the case of *Wright vs. Union Central Life Insurance Co.* (C. C. A., 7 Cir.), 126 F. (2d) 92. This was a case which arose after the decision of the Wright case reported in 311 U. S. 273, above referred to, and the court analyzes the decision in the first case and points out the point that was there decided, therefore, anything that was there said concerning the right to a sale at the request of the secured creditor is merely dictum. The Supreme Court in the case in 311 U. S. 273, seems to have overlooked the distinction between sales under the second proviso, a judicial sale, and a sale under the last provision of (s) (3), a trustee's sale. And it may be pointed out further, that the sale there under discussion had been ordered at the request of a secured creditor *but under the provision for a trustee's sale* for non-compliance with the orders of the court, which is a provision common to both the original Frazier-Lemke Act and the amended act. Therefore, references to the creditor's right to a sale were made with reference to a trustee's sale and not to a judicial sale under the second proviso in subsection (s) (3).

Petitioner insists that the Wright case does not purport to reverse either the Radford case or the Vinton Branch case. The pertinent amendment was not before the court since the order appealed from was for a sale under the last provision of the act, for a final disposition of the case. If it can be contended that the Wright case is decisive of the question here, we feel that it is obviously a misconstruction of the amendment. The court is now not bound to follow it, for this court has held that it is "not bound by reason or by

considerations that underlie *stare decisis* to persevere in distinctions taken in the application of a statute which on further examination, appear consonant neither with the purposes of the statute nor with this court's own conception of it."

Helvering vs. Hallock, 309 U. S. 106, 122, 84 L. ed. 604, 614.

It cannot fairly be said that the court in the first Wright case above intended to overrule anything that had been said by Justice Brandeis in the Radford case and the Vinton Branch case or to overrule either of them. At the time the Vinton Branch case, the first Wright case, was pending in the Supreme Court, the court denied certiorari in cases then pending on petition for certiorari in which the Circuit Courts had held that the secured creditor was entitled to judicial sale under said subsection (s) (3). The question here involved was squarely before the Supreme Court in those cases. It would seem that if the court felt that these Circuit Court decisions were wrong and that the court intended to hold otherwise in the Wright case, it would have granted certiorari in the Circuit Court cases and there announced a reversal of them. Under these circumstances, it seems clearly erroneous to give the Wright case the effect of violating the clear, statutory and constitutional right of this secured creditor. See the cases following:

In re Lowman (7 Cir.), 107 F. (2d) 540, 544;
In re Moon (7 Cir.), 107 F. (2d) 545;
In re Monjon (7 Cir.), 113 F. (2d) 535.

In the Lowman case, the question now before this court was squarely presented. In holding that the secured creditor had a right to have the property sold under the second proviso in subsection (s) (3), the court said:

"The language of paragraph (3) does not purport to grant to a debtor the right to require a reduction in mortgage indebtedness. It does provide a method by which the debtor may acquire the unqualified ownership of the land by payment into court the value of the land as shown by an appraisal. But the authorization of the method is immediately and obviously qualified by the proviso that upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. That the foregoing protection was given to the creditor with the interest of the debtor in mind is made clear by the provision that the debtor have ninety days within which to redeem the property sold at such sale, by paying the amount for which it was sold.

"The foregoing construction is required by the Supreme Court's construction of the language of Section 75, sub. (s) in the opinion in Wright vs. Vinton Branch, *supra*. It is clear from its discussion of the different provisions of the new Frazier-Lemke Act that the Supreme Court was of the opinion that the act preserved the right of the creditor to realize upon the security by judicial public sale. It was stated in the course of the opinion: 'The new act does not in terms provide for "the right to protect its (the mortgagee's) interest in the property by bidding at such sale whenever held." But the Committee reports and the explanations given in Congress make it plain that the mortgagee was intended to have this right. We accept this view of the statute.' The Supreme Court in the course of its opinion in the Wright (Vinton Branch) case clearly construes the new act to preserve the secured creditor's right to realize upon the security by judicial sale and the creditor's right to protect its interests in the property by bidding at such sale whenever held. * * * Also the Supreme Court recognized that under sub. (s) (3), the debtor could end the stay by paying into court the appraised or reappraised value of the land, and thus, *in the absence of a request by a sceured creditor for a public sale,* to acquire full ownership of the land." (Italics ours.)

The reasoning of the court in this case was adopted and followed in the Moon and Monjon cases.

We now refer to the case of *In re Diller* (D. C., S. D., Calif.), 13 Fed. Supp. 249. In construing Section 75, subsection (s) (3), the court says:

> "The act seems to be somewhat ambiguous as to when this right last mentioned (right of secured creditor to judicial sale) shall be exercised. Included as a qualification of the positive provision that the debtor may at any time during the three years pay the appraised value of the property and take it free from encumbrance, the effect to be given to the clause undoubtedly is that the secured creditor can exercise such right at the time when the debtor proposes to pay the appraised value; this may be during or at the end of the three years. * * * Whenever this action is proposed, the creditor may demand that the property be sold at public auction."

We also cite the case of

In re Schoenleber (D. C., Neb.), 13 Fed. Supp. 375.

In this case, the court said:

> "While the language of the act is inapt and uncertain, it undoubtedly was the purpose of Congress to give the secured creditor the right to demand a public sale of the mortgaged property only when the preceding provisions had expended their force. If and when the debtor might evidence a purpose to pay the court the appraised price of the land, then and then only the secured creditor might, if he saw fit, ask for a new appraisement with the further proviso that he might, if he should so elect, demand a public sale."

The recent decision of the United States District Court for the Western District of Virginia is squarely in point here. The district judge writes a scholarly and exhaustive opinion wherein he shows that the decision of the United States Supreme Court in the case of *Wright vs. Union Central Life Insurance Co.*, 311 U. S. 273, does not govern the

question here, as this question was not before the court. We deem this opinion a comprehensive brief on the question now before the court and respectfully refer the court to this case as a supplement to this brief.

This case is the case of

In re Carter, 56 Fed. Supp. 385.

We insist that to deny the request of this secured creditor for a judicial sale is to deny it the constitutional protection of the due process clause. That this clause is at the very foundation of the right of private property was made crystal clear by the United States Supreme Court, when it said:

> "Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that Charter (2 Coke, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."
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> *Ochoa vs. Hernandez Y. Morales,* 230 U. S. 139-161, 57 L. ed. 1427, 1437.

We, therefore, urge that the Supreme Court enter its order for a writ of certiorari to review the order of the Circuit Court.

Dated September 19, 1945.

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